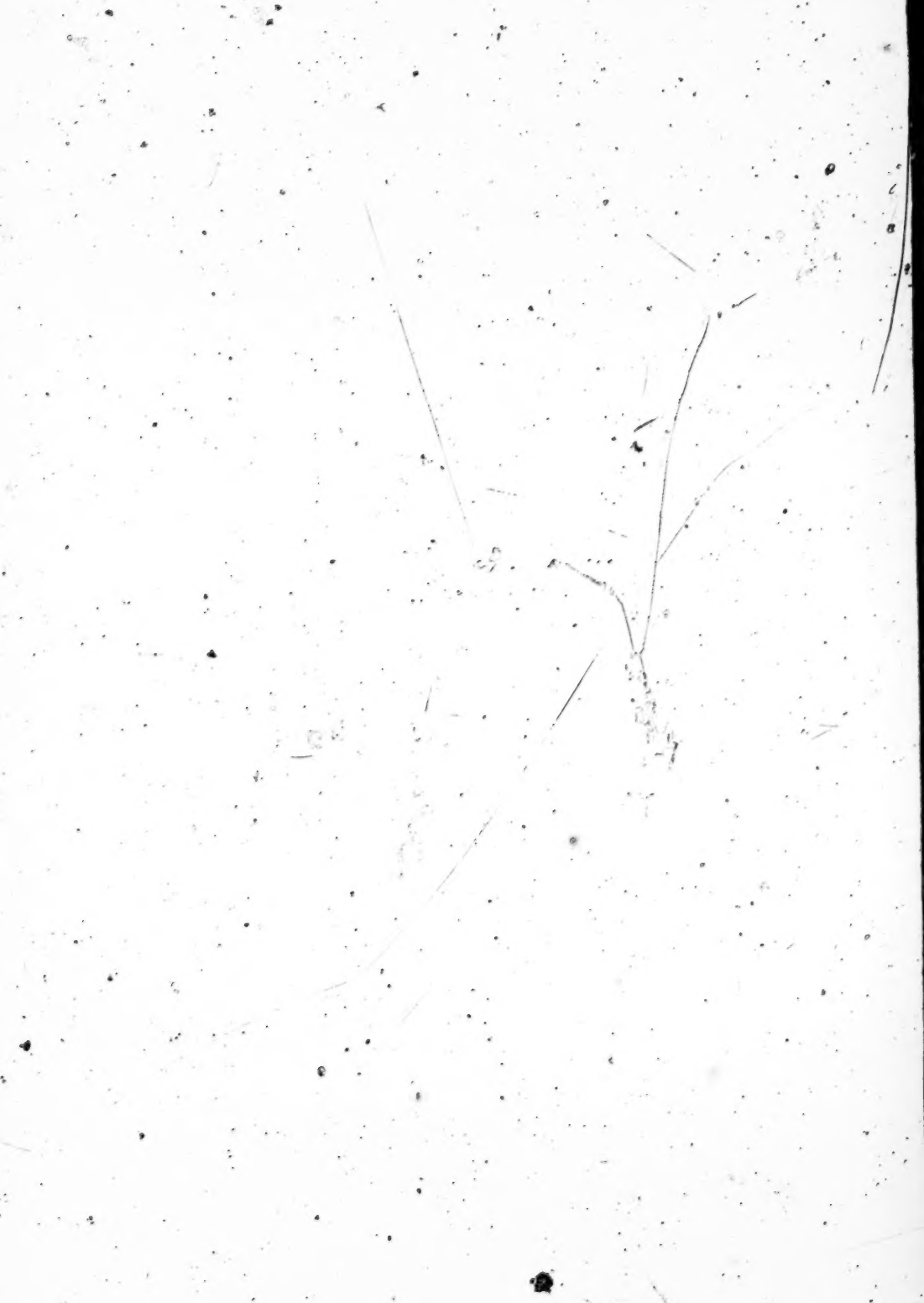

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 293

ROBERT ELI STANLEY,

Appellant,

vs.

THE STATE OF GEORGIA,

Appellee.

APPEAL FROM THE SUPREME COURT OF GEORGIA

BRIEF FOR APPELLEE ON THE MERITS

OPINION OF COURT BELOW

Appellant's Brief on the merits correctly cites the opinion of the Supreme Court of Georgia, the Court below.

JURISDICTION OF THIS COURT

Appellee concedes that probable jurisdiction was noted by this Honorable Court on October 14, 1968 as

stated by Appellant, but most respectfully insists that Appellee's prior Motion to Dismiss the Appeal and to Affirm the Judgment was well-taken.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The citations by Appellant appear to cover the constitutional provisions and statutes involved in this case.

QUESTIONS PRESENTED FOR REVIEW

Counsel for the State of Georgia, Appellee, cannot agree with the wording of Questions 1, 2 and 5 as set out in Appellant's Brief (pages 5 and 6) because as worded the questions assume as true certain evidentiary facts and legal conclusions which are incorrect in part, are disputed by Appellee, and constitute the entire crux of this case. Being dissatisfied with these three questions as phrased by Appellant, we would restate them as follows, pursuant to Rule 40 (3) of this Court:

1. Whether Georgia Code Section 26-6301 (Ga. Laws 1963, p. 78), under which Appellant was convicted, removes the element of scienter from the definition of the offense of possession of obscene matter, by inclusion of the words, "if such person has knowledge or reasonably should know of the obscene nature of such matter," and whether such quoted words make said Code Section repugnant to the First and Fourteenth Amendments to the United States Constitution guaranteeing freedom of the press and due process.

2. Whether a valid search warrant issued by a U. S. Commissioner authorizing a search for book-

making records and other wagering paraphernalia *on September 7, 1966*, founded on affidavits showing sufficient probable cause for issuance of the search warrant and alleging that the person whose home is to be searched has not registered as a gambler under the Wagering Tax Act, is rendered *invalid retroactively* by the holding of this Court, *on January 29, 1968*, in *Marchetti v. United States*, 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States*, 390 U.S. 62 (88 S.Ct. 709).

5. Whether the State may constitutionally punish Appellant for the *knowing* possession of motion picture films depicting sodomy, nudity and sexual intercourse, which constitute "hard-core pornography", where there was sufficient circumstantial evidence to authorize the trial jury to conclude that he knew of the obscene nature of said films and was preparing to exhibit them to a group of adult guests in his home, although there was no evidence to indicate that he had permitted juveniles to view them, or was "pandering" them to the general public.

Our objection to the way Question 5 was phrased by Appellant is his use of the words "mere possession" of films alleged to be obscene and the words "where there is no evidence to show" prior knowledge of Appellant of the obscene nature of the films, etc. We feel this is an unintentional distortion of both the evidence and the Georgia obscenity statute under attack.

We have no disagreement with Appellant's statement of Questions 3 and 4.

STATEMENT OF THE CASE

Counsel for Appellant has stated *the chronology* of proceedings in this case very accurately and we accept it as correct. However, he summarily disposed of all the evidence by one brief paragraph consisting of four sentences, with no citations whatever to either the Appendix or the Record (See Appellant's Brief, Page 8). To comprehend the whole context of this case, we feel it would benefit this Court to have a more detailed summary of the evidence upon which the Motion to Suppress Evidence was overruled, and upon which a traverse jury convicted this Appellant.

A. Evidence on the Motion to Suppress Evidence

Under a peculiarity of Georgia law, the burden is on the State to show that a search and seizure was lawful, once a motion to suppress is filed. Ga. Code Ann. 27-313 (2) (b). It was stipulated between the State and the defense that entry was made into Appellant's home on September 7, 1966 under authority of a search warrant issued by a United States Commissioner for the Northern District of Georgia upon affidavits by four named officers and that three cans of film, the subject matter of the indictment, were found in a drawer upstairs in the house by a U. S. Treasury Agent, in the presence of a State officer. The search warrant and affidavits were admitted into evidence without objection (State's Exhibit 1, A. 15-16).

The search warrant authorized the search of a two-story house at 280 Springdale Drive, Southeast, Atlanta, Georgia, for particularly described bookmaking records and money used in a wagering business operated in violation of Sections 4411, 4412, and 7203, Internal Rev-

enue Code of 1954 (State's Exhibit 1, A. 24-25). The Return shows that nothing was seized by the Federal officers except two Sports Journals and line sheets for August 1 to September 3, 1966 and for games for the week ending September 18, 1966 (A. 26).

Four very detailed affidavits by three Federal officers and one State officer (A. 29-57) set forth ample probable cause for belief that Appellant and one Jerry D. Paschall were then engaged in a bookmaking operation in Atlanta, Georgia. Appellant is identified as a prominent Atlanta lottery operator who has branched out into the bookmaking business. Appellant's two prior lottery arrests and his prior conviction and prison sentence for receiving stolen goods are set out (State's Ex. 1, A. 29). Detailed surveillances and confidential information over a six-month period linking Appellant, Paschall and another convicted bookmaker, Charles A. Thomas, are set out in the four affidavits which are some 28 printed pages in length (State's Ex. 1, A. 29-57). Since Appellant has never challenged the sufficiency of the probable cause affidavits, or of the federal search warrant itself, either in the Courts below or in his Brief before this Court, we feel it unnecessary to further summarize the search warrant and affidavits.

State officer George A. Carter testified that the three cans of 8 millimeter film were found in a desk in the upper bedroom of the home.

The officers used a movie projector in the upstairs living room, ran and observed the films, called the Solicitor of the Superior Court of Fulton County, and seized the films (A. 16-18). His assignment was lottery and bookmaking investigations when he accompanied the Federal officers (A. 20). When they arrived, Appel-

lant was alone inside the house but shortly thereafter two other men arrived (A. 21). The officers searched the bedroom where the films were found, and observed clothes with drycleaning tags bearing Appellant's name, mail addressed to Appellant and a tax notice for that address (A. 21). He went downstairs, advised Appellant that he had found obscene films upstairs and that he was under arrest. Appellant made no statement whatever about the film (A. 22). When they got ready to leave, Appellant went upstairs and got his coat out of that bedroom (A. 21). This substantially covers the evidence on the motion to suppress evidence.

The trial Court issued a written opinion and order overruling the motion to suppress (A. 58-59). The Court noted that the lawfulness and sufficiency of the Federal search warrant and affidavits were not attacked or questioned by the defense, and found as a matter of law that the search warrant was a valid one issued upon sufficient probable cause. The trial Court further held that the films were lawfully seized as contraband while in the process of effecting a lawful search under the Federal warrant, citing State and Federal decisions (A. 59).

B. Evidence in the Jury Trial

Special Agent William A. Pair, Intelligence Division, Internal Revenue Service, testified that at 6:00 p.m. on September 7, 1966, he, Special Agent Darrell Smith, and Investigator George Carter drove to Appellant's home with a Federal search warrant. Two men were standing beside a Ford parked behind Appellant's house named Joe Dean Stanley and Wallace. Appellant was inside the house and admitted Investigator Carter (A. 86-87). Mr. Pair identified himself, showed Appellant

the search warrant and advised him of his Constitutional rights, including his right to an attorney before being questioned. The two men in the yard, Joe Dean Stanley and Wallace entered the house and were seated in the living room. In the combination kitchen, dining room and bar, the table was set up for about eight persons (A. 88, 89, 90). Adjacent to the stove was a large pan of prepared biscuits, about three dozen (A. 91). Several visitors came to the house while the officers were there, a man named J. R. Kennedy, a lady named D. (Dee) Stanley, and two young ladies, (A. 90-91). All were well dressed (A. 91). The visitors were not allowed to enter (A. 91).

Federal Agent Darrell Smith found the three reels of film in a drawer of the desk in the master bedroom (A. 93-94), ran them in a projector found in the sitting room and saw they showed naked men and women having sexual relations and committing sodomy upon each other (A. 95-96). The desk had letters addressed to Appellant, stock brokerage forms bearing his name; the closet of the master bedroom had suits in it with Appellant's name on them (T. 96-97).

State Investigator Carter's testimony was substantially the same as upon the Motion to Suppress, with the following additions: the three films seized were shown in the Grand Jury Room on September 16, 1966, to a number of persons, all of whom signed their names to State's Exhibit 4 (A. 100). During the course of the search, he talked with Appellant's attorney, Mr. Wesley Asinof, (A. 101-102). He based his opinion as to the obscene nature of these films upon the actual contents of the films as he viewed them, showing sodomy and sexual intercourse (A. 102-103).

Special Agent Howard Farr, Internal Revenue Service, testified that he is a former professional photographer with five years experience (A. 104). He set up the projector and displayed the films on the date of the search. The three films are badly scratched and dirty. One roll was wound backwards, apparently never having been rewound after a showing of the film. He ran a few feet of that roll upside down on the screen. In his expert opinion, the films had "obviously" been shown before by someone (A. 105).

The films were admitted into evidence, without objection (A. 105), placed in a movie projector, and shown to the jury in a darkened courtroom.

To prove the elements of the Georgia obscenity statute, the following residents of Fulton County, Georgia, who had previously viewed the films in the pre-indictment showing, testified that they are familiar with the contemporary standards of their communities, and that the predominant appeal of these films is to a shameful and morbid interest in nudity and sex: Dr. James P. Westberry, pastor of the Morningside Baptist Church and also Chairman of the Georgia State Literature Commission since 1953 (A. 105-107); Thomas E. Price, service station operator in Northeast Atlanta (A. 109-110); Hinson McAuliffe, attorney and prosecutor of the Fulton County Criminal Court, living in Southwestern Atlanta (A. 111-112); Howard M. Hargis, retired locomotive engineer, living in Fairburn, Georgia, in the south end of Fulton County, Georgia (A. 112-114); C. Clayton Powell, optometrist, living in Southwest Atlanta (A. 114-115); J. R. Wilson, real estate business, living in Southwest Atlanta, but having his

place, of business in Northwest Atlanta (A. 116-117); Charles Stewart, Assistant Solicitor General, living in Southwest Fulton County (A. 118-119), and Investigator George Carter (A. 102).

In addition, Investigator Carter and Dr. Westberry each testified that there is no redeeming social value or importance whatsoever in those three films (A. 102; A. 108). We point out that two of these State's witnesses drawn as a cross-section of the Fulton County community are Negro citizens, i.e., Dr. Powell and Realtor Wilson.

Despite the defense contention throughout the trial that these films are not obscene (A. 108), the defense introduced no testimony of any kind to dispute the testimony of these State's witnesses as to the obscene nature of the films, which Dr. Westberry described as "the most obscene film or pictures I have seen in my life, the most obnoxious, nauseating, sickening, and foul and disgusting, it reaches as far as I am concerned in the entire 13 years, the lowest level that I can imagine" (A. 108).

The Appellant made a very brief unsworn statement to the jury in which he said he is a bachelor living alone and has a girl friend. He planned a Labor Day party, invited several couples out, and a friend (whom he did not identify) came by and gave him three rolls of film saying he wanted Appellant to see it. Appellant said he put the film in the desk drawer and had completely forgotten about it until informed by the officers that they were arresting him for it. Appellant said he never saw the film before today (when it was shown in the courtroom) and had never shown them to anyone (A.

119-120). Of course, the Appellant could not be cross-examined on his unsworn statement without his consent, under Georgia law.

SUMMARY OF ARGUMENT

I

The Georgia Obscenity Statute is not Unconstitutional

The words in the Georgia obscenity statute "if such person has knowledge or reasonably should know of the obscene nature of such matter . . . " do not withdraw the element of scienter from the statute. The Supreme Court of Georgia has flatly ruled to that effect in this same case in its opinion below, and this Court must, under its prior decisions, accept this construction of a State statute by the highest Court of that State.

Further, the Georgia statute is not unconstitutional because it prohibits and punishes possession of obscene matter, with knowledge of its obscene nature. If the material is obscene, it is not protected by the First Amendment to the United States Constitution and a State may lawfully prohibit its possession, declare it to be contraband, and punish one who knowingly possesses it. Unlike the bookseller prosecuted for *distributing* questionable books or magazines, the individual who knowingly *possesses* obscene matter is not circulating ideas to the public; therefore, freedom of speech and of the press is not involved.

The State has an interest in protecting the individual as well as the general public from lewd and lacivious pornography. The possession of obscenity can and often does lead the possessor to commit hideous crimes in-

spired by lust and passion; thus the State may legitimately punish the individual for possession with scienter of such obscene material.

II

The Films in this Case are Hard Core Pornography and are not Protected by the First Amendment; Therefore, It is not Necessary for this Court to Decide the Constitutionality of the Georgia Obscenity Statute.

The majority of this Court has consistently held that obscenity is not protected by the First Amendment. The Court should confine itself to the facts in this case, and go no further than is necessary to decide this one case. These films depict nothing but successive orgies by nude men and women engaging in repeated acts of seduction, sodomy and sexual intercourse. They are hard core pornography of the worst type. If this Court agrees with this appraisal of the films after viewing them, then they are obscene, they are unprotected by the First Amendment, and it is unnecessary for this Court to decide whether the "possession with scienter" portion of the Georgia obscenity statute is or is not constitutional.

This case was tried according to the exacting standards fixed by this Court in a series of opinions dealing with the obscenity question. No trial error whatever is urged by Appellant. The central question was "Are these films obscene and, if so, did the Appellant possess them with knowledge of their obscene matter?" The trial jury and the highest Court of the State have answered that question in the affirmative. If this Court agrees that the films are obscene, it need go no further. The cases relied upon

by Appellant are all distinguishable because they all deal with *literature* intended for dissemination to the public at large.

III

The Seizure of the Films Was Lawful.

The films were lawfully seized as contraband during a search for gambling paraphernalia under authority of a valid Federal search warrant. Appellant concedes that such a seizure can usually be lawfully made, even though the seized articles are not particularly described in the search warrant, but argues that this general rule does not apply to articles alleged to be obscene. We reply that the three films seized are so obviously hard core pornography that they were easily recognized as such by the seizing officers, who did not have to read and evaluate *books or magazines*, as in the cases cited by Appellant, to make their own judgment as to obscenity. Once again the key to the lawfulness of the seizure is the unmistakable obscenity of the films.

IV

Valid Federal Search Warrants Issued and Executed in 1966 are not Rendered Invalid by the 1968 Decisions of this Court in Federal Wagering Tax Cases.

This Court's opinions in *Marchetti v. United States*, 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States*, 390 U.S. 62 (88 S.Ct. 709) were very narrow ones. They held only that a defendant in a Federal criminal case charged with failing to register as a gambler and pay the occupational and excise taxes can assert at trial his Fifth Amendment privilege against self-incrimination (because if he *had* registered and paid the Federal taxes, he

could be prosecuted by the States under their anti-gambling statutes). Nothing in those cases holds that prior valid Federal search warrants are *retroactively* rendered invalid now. Those two cases do not even hold that Federal search warrants cannot be lawfully issued *now* to seize wagering paraphernalia.

The extent of the *Marchetti* and *Grosso* decisions is still under consideration by this Court. In no way, however, can they be construed as operating retroactively to invalidate formerly valid search warrants issued sixteen months prior to those decisions. We urge this Court to continue to refuse to give retroactive effect to new decisions which overrule its own prior decisions, as this Court has done in the past.

The seizure of the three pornographic films as contraband was completely lawful, being effected as an incident of a lawful search being conducted under authority of a valid Federal search warrant issued upon affidavits showing ample probable cause.

The judgment of the Supreme Court of Georgia should be affirmed, or, alternatively, Appellee's Motion to Dismiss Appeal should be granted upon a finding that probable jurisdiction was improvidently noted.

ARGUMENT

This whole case hinges on only two basic questions, (1) the constitutionality of the Georgia obscenity statute and (2) the lawfulness of the seizure of the pornographic films in Appellant's home. As presented by Appellant, his Questions 1 and 5 attack the constitutionality of the Georgia obscenity statute and his Questions 2, 3, and 4 complain that the seizure of the films

was unlawful. However, in his Argument section, his citations and argument are interwoven back and forth between his five questions in such a manner as to make it difficult to answer without constant repetition.

We think Appellee can present a clearer argument by discarding Appellant's five question format and dividing this portion of the Brief into two main sections, to wit, constitutionality of the statute and lawfulness of the seizure. We will attempt to answer all points raised by Appellant in his five questions, however.

I. GEORGIA OBSCENITY STATUTE IS NOT UNCONSTITUTIONAL

(A) The Georgia Obscenity Law does not Withdraw the Element of Scienter.

Appellant bases virtually his entire argument upon the following clause in the Georgia obscenity statute, . . . "shall, if such person has knowledge or *reasonably should know of the obscene nature* of such matter, be guilty of a felony. . . . " (See the entire statute, Appellant's Brief, Pages 4, 5). He urges upon this Court his contention that the foregoing (italicized) words withdraw scienter from the statute, making it possible to convict an otherwise innocent possessor of an obscene book which he has not read and does not know to be obscene (Appellant's Brief, page 13). This argument completely ignores the words " . . . if such person has knowledge" and also another clause in the same statute saying in part "Any person . . . who shall *knowingly* have possession of . . ." This last quoted clause of the Georgia statute is the exact clause under which Appellant was convicted. It must be noted that the statute

penalizes *knowing* possession of obscene matter and then repeats much further on, as a kind of catch-all covering all the various types of obscenity violations contained therein of selling, offering to sell, lending, giving away, transmitting, advertising, manufacturing, printing and possession of obscene matter, the scienter requirement "if such person has knowedge." Thus, the scienter element is present twice in the same statute, once actually incorporated in the definition of the "possession" offense of which Appellant stands convicted. Thus we submit that scienter is clearly made an element of the offense.

We turn now to the words "or reasonably should know of" the obscene nature of such matter. Appellant argues that this language withdraws scienter from the statute (Appellant's Brief, Pages 11-14).

Here we most respectfully point out that where language of a State statute is ambiguous, vague, or capable of being interpreted several different ways, this Honorable Court *must* accept the construction placed upon the ambiguous language by the highest Court of that State. In the 1958 case of *Kingsley International Pictures Corp. v. Regents of the University of the State of New York,* 360 U.S. 684, 688 (79 S.Ct. 1362). Mr. Justice Stewart, speaking for the Court, said, in pertinent part:

> ". . . We accept too, *as we must,* the construction of the New York Legislature's language which the Court of Appeals has put upon it." (Italics added).

In the more recent case of *Cramp v. Board of Public Instruction of Orange County,* 368 U.S. 278 (1961), (82 S.Ct. 275), Mr. Justice Stewart said again, speaking for the Court, in pertinent part:

"The Florida Supreme Court first considered the

> provisions of this legislative oath in *State v. Diez*, 97 So. 2d 105, a case involving the validity of an indictment for perjury. There the Court upheld the constitutionality of the legislation only upon finding it . . . 'inherent in the law that when one takes the oath that he has not lent aid, advice, counsel and the like to the Communist Party, he is representing under oath that he has not done so knowingly.' 97 So. 2d at 110. In the present case the Florida Court adhered to this construction of the statute, characterizing what had been said in *Diez* as a ruling that *'the element of scienter was implicit in each of the requirements of the statute'*. 125 So. 2d, at 557. *We accept without question this view of the statute's meaning, as of course we must. This authoritative interpretation by the Florida Supreme Court 'puts these words in the statute as definitely as if it had been so amended by the legislature'. Winters v. New York*, 333 U.S. 507, 514." (Italics added).

For other cases holding that this Court *must* accept an authoritative interpretation of a State statute by the highest Court of that State, or defer to that State Court for an interpretation, see *Albertson v. Mallard*, 345 U.S. 242, at 245 (1952), (73 S.Ct. 600); *United States v. Burnison*, 339 U.S. 87, at 89 (1949), (70 S.Ct. 503); and *Aero Transit Co. v. Commissioners*, 332 U.S. 495, at 498 (1947), (68 S.Ct. 167). In the last cited case, Mr. Justice Rutledge, speaking for a unanimous Court, said in pertinent part (332 U.S. at 498):

> ". . . The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to State statutes by State courts."

With this foregoing principle firmly established by

this Honorable Court, we point out that the Supreme Court of Georgia has held unanimously *in this same case* that the words "or reasonably should know" *do not withdraw the element of scienter from the definition of the offense of possessing obscene matter.* In *Stanley v. State,* 224 Ga. 259, 161 S.E. 2d 309, Mr. Justice Frankum said, in pertinent part, at page 260:

> "Defendant contended in the third ground of his general demurrer to the indictment that the law under which he was indicted is unconstitutional, null and void as in conflict with the first and fourteenth Amendments to the Constitution of the United States guaranteeing freedom of the press and due process of law in *that it seeks to punish persons charged with the violation of the law if they reasonably should know* of the obscene nature of such matter, *it being contended that the requirement of reasonable knowledge would withdraw the element of scienter from the definition of the offense and would render a person guilty without actual knowledge of the obscene nature of the matter. This contention is without merit.* As we construe the statute the language *'if such person has knowledge or reasonably should know of the obscene nature of such matter'* merely amounts to a statutory expression of a rule of evidence which has been extant in this State over many years. Whether a person has knowledge of a fact is a matter peculiarly within the mind of such person, and it is rarely if ever that the defendant's guilty knowledge is susceptible of direct proof. For this reason this Court has adhered to the principle that guilty knowledge may be shown by circumstances as well as by actual and direct proof. . . . The statute is therefore not unconstitutional for any of the reasons urged, and the trial Court did not err in overruling the general and special demurrers of the

defendant in which he sought to raise this issue." (Italics added).

Thus the Supreme Court of Georgia has flatly and directly rejected Appellant's contention that scienter has been withdrawn from this obscenity statute, by interpreting the exact words of that statute which Appellant is now repeatedly attacking in his Brief as withdrawing the element of scienter. Under the rule of *Kingsley Pictures Corp., Cramp, Winters, Albertson, Burnison* and *Aero Transit*, all supra, we do not feel that this Honorable Court can review or reverse the interpretation placed upon this statute by the highest Court of Georgia, unless this Court summarily overrules all of its prior decisions just cited. No good reason appears for this Court to take such drastic action.

We wish to point out that this interpretation of the words "or reasonably should know" as merely a statutory expression of a Georgia rule of evidence is deeply imbedded in Georgia case law and is not one newly created by the Supreme Court of Georgia expressly for the purpose of upholding this statute or of affirming the conviction in this case. In 1903, in *Rivers v. State,* 118 Ga. 42, 44 S.E. 859, a unanimous Georgia Supreme Court held:

> "Where the knowledge or intent with which an act is done constitutes an element of a criminal offense, it is ordinarily impossible to prove the actual mental state of the defendant, *the prosecution being only required to show the ability and opportunity to know.*" (Italics added).

Also, in *Birdsong v. State,* 120 Ga. 850, 48 S.E. 329, the Supreme Court said, in 1904:

"On the trial of one indicted for receiving stolen

> goods, it is not error to charge, in effect, that guilty knowledge is essential to a conviction of the accused, but that *such knowledge may be inferred from circumstances which would*, in the opinion of the jury, *lead a reasonable man to believe that the goods were stolen.*" (Italics added).

Appellant's chief reliance is upon *Smith v. California*, 361 U.S. 147 (80 S.Ct. 215). Such strong reliance is clearly misplaced, for *Smith* is distinguishable from the instant case in two major particulars, to wit: (1) *Smith* involved the charge of possession of an obscene book by a bookstore proprietor, whereas the instant case involves possession of a "stag" movie film (so characterized by Appellant himself — Brief, Page 8) which is so clearly "hard core pornography" as to be unprotected by the First Amendment and (2) the city ordinance in *Smith* "imposed a strict or absolute criminal liability on Appellant not to have obscene books in his store" (361 U.S. at 150) and the *definition* of the offense and *its construction by the California courts* include "no element of scienter — knowledge by Appellant of the contents of the book" (361 U.S. at 149), whereas in the instant case the definition in the Georgia statute contains the essential words "knowingly", "know", or "knowledge", which require proof of scienter, no less than *nine times*, and the Supreme Court of Georgia has construed the statute in this same case as *not* withdrawing the element of scienter. Thus *Smith*, supra, has utterly no significance in this case, except as a convenient vehicle for argument by Appellant.

Finally, we point out that in a very recent decision of this Court, *Ginsberg v. New York*, 390 U.S. 629 (88 S.Ct. 1274), (1968), an attack upon the scienter pro-

vision of the New York obscenity statute was rejected by this Court. The New York statute defined "knowingly" as "having general knowledge of, *or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, or both*" (390 U.S. 643, 646. Italics added). This Court affirmed the conviction in *Ginsberg*.

The foregoing italized words from the New York statute are very similar in meaning to the words in the Georgia obscenity statute, "or reasonably should know." Thus we submit that the overwhelming weight of authority shows conclusively that scienter is not withdrawn from Georgia's statute by the last-quoted words.

These films, which we respectfully urge this Court to view *in camera* prior to oral argument, are not literature in any sense of the word. They contain no plot, no dialogue, no moral lesson, no insight into contemporary social customs or mores, or any other redeeming social value. They are not designed — on 8 millimeter film — for public exhibition in motion picture theatres, but only for lustful private showings at exorbitant rental or purchase prices. They consist of nothing except close-up scenes of seduction, display of male and female gentillia and pubic regions, oral sodomy, and sexual intercourse in a variety of positions. Thus we feel that the films are pure obscenity. This Court said in *Roth v. United States*, 354 U.S. 476 (1956), (77 S.Ct. 1304):

> "We hold that obscenity is not within the areas of constitutionally protected speech or press." (354 U.S. at 485).

The films are also "hard core" pornography as dis-

cussed by Mr. Justice Harlan (dissenting opinion, *Roth*, supra, at 507, 508) and by Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (84 S.Ct. 1676) (concurring opinion). Therefore, counsel for Appellee earnestly insist that these filthy motion pictures are neither "speech" nor "press" as contemplated by the First Amendment and as dealt with by this Honorable Court in a long line of decisions beginning with *Roth*, supra.

Therefore, while we of course respectfully defer to this Honorable Court's noting of probable jurisdiction in this case, we also respectfully insist that our Motion to Dismiss the Appeal or alternatively, to Affirm the Judgment Below was meritorious, in view of the interpretation by the Supreme Court of Georgia on the question of scienter, which this Court is bound to accept, by its own precedents. We respectfully suggest that, either prior to oral argument or thereafter, this Court may wish to reconsider and dismiss this appeal by entry of an order that probable jurisdiction was improvidently noted.

(B) The Georgia Obscenity Statute is not Unconstitutional Because It Makes Knowing Possession of Obscene Matter an Offense.

This is the second prong of Appellant's attack upon the constitutionality of the Georgia Obscenity Statute. He argues continuously in his Brief that one may not constitutionally be punished for "mere possession" of obscene matter. However, he intertwines with this argument his thesis that the Georgia statute dispenses with all scienter and therefore a person can be convicted in Georgia upon *bare possession* alone. We think we have adequately shown the fallacy of this argument in the

preceding section of this Brief. Scienter *is* an element of this offense.

Therefore, we think the second aspect of the constitutionality of the statute is whether Georgia may punish a citizen for *possession* of obscene matter, *knowing of its obscene nature,* without including the additional elements of exhibiting, selling, lending, printing, manufacturing, offering for sale, etc., of such obscene matter. In other words, is a statute imposing criminal sanctions upon the mere possession of obscene matter, *knowing of its obscene nature,* constitutional? The Supreme Court of Georgia has said that it is in the instant case, saying in part:

> "It is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was with intent to sell, expose or circulate the same." *Stanley v. State,* 224 Ga. at 261.

In other words, it is undisputed by Appellee that one of the numerous types of obscenity violations contained in the Georgia statute penalizes the possession of obscene matter, with knowledge of its obscene nature, and that the Appellant Stanley was convicted under the portion of the statute reading, "or who shall knowingly have possession of" (See Indictment A. 5, 6).

This appears to be a case of first impression in this Honorable Court on this exact point. In none of the decisions in the obscenity field that counsel for Appellee have studied have we been able to find a ruling by this Honorable Court on the precise question, "May possession alone of obscene matter, *with scienter* on the part of the possessor, be constitutionally punished by the

States?" Neither has Appellant cited any case in point. The closest approach to this point is *Smith v. California,* supra, where the appellant was convicted of bare possession alone, *without* scienter. This Court reversed that conviction, of course, but solely on the "absolute criminal responsibility . . . without any element of scienter" feature of the city ordinance (361 U.S. at 150). This Court did *not* say in *Smith,* supra, that *possession* of obscene matter *plus scienter* could not be constitutionally punished. In fact, the majority of this Court, speaking through Mr. Justice Brennan seemed to *imply* that a bookseller who has knowledge of the obscene nature of the books he stocks *may* be punished for such knowing possessing alone, by the following language (361 U.S. at 154):

> "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pount, The Role of the Will in Law, 68 Harv.L. Rev. 1. Cf. *American Communications Assn. v. Douds,* 339 U.S. 382, 411. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.
>
> We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller *for carrying an obscene book in stock;* whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the bur-

den of explaining why he did not, and what such circumstances might be." (Italics added).

The foregoing language certainly suggests that if the city ordinance in *Smith* had contained the element of scienter, and if the prosecution had proved the defendant's awareness of the contents of the book in question, he could have been constitutionally convicted of its possession, or as the Court puts it, "for carrying an obscene book in stock". The Los Angeles ordinance prohibited possession alone and contained no additional elements such as intent to sell or distribute (361 U.S. at 148). This construction of the Court's opinion in *Smith* seems further strengthened by the concurring opinion of Mr. Justice Black in the same case where he says, in part, "The Court's opinion correctly points out how little extra burden will be imposed on prosecutors by requiring proof that a bookseller was aware of a book's contents *when he possessed it*" (361 U.S. at 156. Italics added).

This Court closely approached the question at issue in *Mishkin v. New York,* 383 U.S. 502 (86 S.Ct. 958) (1966), when it affirmed the conviction of a defendant for possession of obscene books, with intent to sell them. Incidently, in this case this Court once again held that scienter was an element of the New York statute because the New York Court of Appeals had so interpreted it in *People v. Finklestein,* 9 N.Y. 2d 342, 214 N.Y. S.2d 363, 174 N.E. 2d 470 (1961) saying that appellant's challenge to the validity of the statute, based on *Smith,* "is thus foreclosed" (383 U.S. at 510). We again submit that the question of scienter is equally foreclosed in this case.

The statute in the *Mishkin* case, supra, of course, con-

tains one additional element missing in the Georgia obscene matter "possession" clause, i.e., the intent to sell the obscene book.

We conscientiously take the position that, in the limited area of "hard core pornograph", as distinguished from literary or pictorial publications such as nudist magazines, "girlie" magazines, novels and other books dealing extensively with sex, and movies whose plots are based in large part on adultery, homosexuality and the like, which are on the questionable "borderline" of obscenity, the State may prohibit an individual from possessing *obscene* matter as defined by this Court, if he knows of the obscene nature of such matter and may further punish him if he does so. Our reasoning goes like this: in *Roth,* supra, this Court held that "obscenity is not within the area of constitutionally protected speech or press." (354 U.S. at 485). This Court then set out in *Roth* the test for obscenity (See 354 U.S. at 487, note 20). The Georgia statute, enacted in 1963 and after *Roth,* follows this approved definition almost to the letter.

This Court reiterated in *Ginsberg v. New York,* supra, that "obscenity is not protected expression" (390 U.S. at 641). The Court said further in *Ginsberg,* supra, that "the State also has an independent interest in the well-being of its youth" (390 U.S. at 640), thus reiterating its comment in *Prince v. Massachusetts,* 31 U.S. 158 (64 S.Ct. 438), at 165, that the State has an interest "to protect the welfare of children". We submit that this Court should go one step further and declare that the State has an interest to protect the well-being of its adult citizens as well as that of its minors.

There are numerous examples of the States and the Federal Government protecting *the citizen* against *his own acts,* as contrasted with protecting society against the acts of *a citizen.* An interesting analogy is the almost universal criminal sanctions against gambling. This Court noted in *Marchetti v. United States,* 390 U.S. 39, at 44 (88 S.Ct. 697) that "State and local enactments are more comprehensive. The laws of every State, except Nevada, include broad prohibitions against gambling, wagering, and associated activities." Georgia, for example, makes it a misdemeanor for any person to "play and bet for money or other thing of value at any game played with cards, dice or balls . . . or at any table for gaming . . . or at any billiard or pool table" (Ga. Code Ann. 26-6404).

One taking Appellant's view could well argue that it is unconstitutional to prohibit an adult citizen from doing what he wants to with his own money. He works for and earns his monthly pay check. If he wants to squander it all in one poker game, the State should have no power to prevent him from doing so, or punish him if he does so. Thus the argument could go. However, we know of no case in which this Court has struck down a State statute penalizing a citizen for gambling with his own money.

(C) Many State and Federal Statutes Prohibit and Punish Mere Knowing Possession of Contraband.

We will simply point out here a few of the multitude of crimes punishable by State statutes for mere *knowing possession* of property declared by law to be contraband, to wit: *possession of* stolen goods, burglary tools, non-tax-paid whiskey, concealed weapons (unlicensed),

forged checks, gaming tables and gambling paraphernalia, slot machines, whiskey stills or apparatus, narcotics, dangerous drugs and illegal firearms, such as machine guns.

Turning to Federal statutes, *knowing possession* under certain circumstances of narcotics, certain drugs such as amphetamines and barbiturates, unlicensed whiskey stills, non-tax-paid whiskey, stolen property transported interstate or stolen from interstate shipments, counterfeit U.S. currency or apparatus, badges or identification cards of a United States Agency, plates for the printing of U.S. passports, stolen mail matter, money taken in a robbery of an F.D.I.C. insured bank, etc., are all punishable by federal imprisonment.

The foregoing "possession crimes" are only illustrative and by no means comprehensive of *all* the State and Federal statutes which punish unlawful and knowing possession of contraband.

Assuming that *obscenity* is not protected by the First Amendment, as this Court held earlier this year in *Ginsberg*, supra, why may a State not declare obscene matter to be contraband and punish its knowing possession by anyone, minor or adult? Is a State constitutionally authorized to protect the *body* of a citizen, by prohibiting by criminal sanctions his possession of things which will harm his body and injure his health – narcotics, intoxicating liquor, dangerous drugs, etc., but constitutionally prohibited from protecting his *mind* by making his possession of filth a crime? We answer the last question in the negative, because in prohibiting the citizen's possession of obscene matter the State is also

inhibiting him from the likely and probable consequences of such possession.

The viewing of films similar to those in the instant case will certainly arouse in certain types of human minds the most violent and depraved sexual urges. After viewing such wanton scenes of sex and sodomy, the viewer may well be aroused to such a pitch of sexual passion that he must satiate it at any cost. Rape, murder, mutilation and sodomy (either voluntary or procured by force) perpetrated upon the helpless public follow in many cases.

Then too, a mere "possession, with scienter," statute is necessary for suppression of "hard-core pornography" in many cases because of evidentiary problems. Take the instant case, for example. Appellant may have been the actual owner of the films and may have been renting or showing them extensively throughout this community, for all we know. They certainly had seen extensive use, as evidenced by their dirty, scratched condition. But, absent a confession from Appellant — and persons of his criminal background rarely admit anything — the State could not prove this. Unless a possessor of "hard-core pornography" is caught red-handed while actually exhibiting it to an audience, or with such a quantity of it in his possession that a clear inference arises that he intends to sell, circulate and distribute it to the general public or to some segment thereof, or under circumstances where it is clearly being offered for sale, *knowing possession* of the obscene matter is all that the State can prove.

In such cases, by having a criminal statute penalizing "knowing possession", however, the State can halt the

obviously contemplated, though legally unprovable, dissemination of the pornography to the public at its source, and punish the possessor. Thus, such a statute in its long-range effect protects the public from uncontrolled and unforeseeable use of the pornographic material by its possessor.

(D) This Honorable Court Should Rule Squarely on the Obscene Nature of the Films Involved in This Case.

Appellant relies heavily upon the three cases jointly decided in *Redrup v. New York,* 386 U.S. 767 (87 S.Ct. 1414). (Brief, page 15). In those cases, all of which involved distribution of *magazines on sale at newsstands* — which completely distinguishes them factually from this case — this Court originally limited review to the issue as to proof of scienter in two cases (*Redrup v. New York,* 384 U.S. 916 and *Austin v. Kentucky,* 384 U.S. 916) and to constitutionality of an Arkansas anti-obscenity statute (*Gent v. Arkansas,* 384 U.S. 937) in light of the doctrines of "vagueness" and "prior restraint." Thus, as forcefully pointed out by Justices Harlan and Clark (dissenting opinion, 386 U.S. 771), the permissibility of the State determinations of obscenity of the publications *was laid aside.* Yet, the Court ruled that the materials could not be constitutionally adjudged obscene (Harlan, J., dissenting opinion, 386 U.S. at 772).

We therefore most respectfully urge this Honorable Court *to rule directly upon the obscenity* of these three films. If they are obscene, they are not protected by the First Amendment and therefore this Court does not have to rule on the broader constitutional question as

to whether the "knowing possession" portion of the Georgia obscenity statute violates First Amendment rights. A simple factual finding of *obscenity* can eliminate the constitutional question completely.

It is a fundamental policy of this Court that it will limit its decision to the facts before it and to the validity of the statute in question as applied to the facts (see concurring opinion of Mr. Chief Justice Warren, in *Roth*, supra, 354 U.S. at 494).

(E) The Evidence Was Sufficient to Support a Findings of Scienter and of an Intent to Display Obscene Films to Adult Guests.

Appellant in his Question 5 poses the question of the constitutionality of a conviction for "mere possession" of films where there is "no evidence" that Appellant knew them to be obscene, had ever viewed them or permitted juveniles to view them, was publishing them so obtrusively as to make it impossible for an unwilling person to avoid exposure to them or was pandering them (Appellant's Brief, page 6).

Yet Appellant says on page 24 of his brief that "it is unnecessary for the Court to review the evidence." We have set out the evidence in our Statement and will not unnecessarily rehash it. However, we earnestly insist that *circumstantially* there *was* enough evidence to show Appellant's knowledge of the obscene nature of the films. After conviction, the evidence must be considered in the light most favorable to the prosecution, which must be given the benefit of all inferences reasonably to be drawn from the evidence. *Morton v. United States*, D.C. Cir., 1945, 147 F.2d 28, cert. den. 324 U.S. 875; *Arena v. United States*, 9 Cir., 1955, 226 F.2d 227, cert.

den. 350 U.S. 954; *Bianchi v. United States*, 8 Cir., 1955, 219 F.2d 182, cert. den. 349 U.S. 915; *Fields v. United States*, 4 Cir., 1955, 228 F.2d 544, cert. den. 350 U.S. 982.

Thus the State showed that the films in question were concealed in a drawer of the Appellant's desk in his master bedroom and were not with the other innocuous films and projector in the upstairs living room. One of the cans of films bears the home-made and suggestive label "Young Blood" (See can itself or description in Indictment, A. 5). When the officers arrived, two men were in Appellant's backyard. While the search was in progress, another man and three women arrived at Appellant's home. A table was set for eight and three dozen biscuits were ready for cooking. This added up to a total of seven persons, four men and three women, including Appellant, at his home that night (apparently one woman was tipped off that the party was off because of the presence of the officers and did not make her appearance.) The film was scratched, dirty and one reel was wound backwards, indicating recent viewing. Appellant made no comment whatever when told he was under arrest for the obscene film found upstairs. While his exercise of his constitutional right to remain silent cannot be used against him, surprise, protest or disclaimer of any knowledge of the nature of the films would seem a more natural reaction, if he had never viewed them before and did not know they were obscene.

Then, his unsworn statement, together with reasonable inferences drawn therefrom, would support a finding that after he planned his Labor Day party and invited several couples, someone (he said a friend — whom

he did not identify) brought the films by with the suggestion that he view them. The obvious inference is that they were to be shown at the party, to four couples, including himself. It is further a reasonable inference that he either would have viewed them himself prior to the party, or would have been informed by his generous "friend" of the general nature of the films. In either case, scienter would be present.

We point this out only because Appellant's Question 5 leaves the impression that nothing was proved except that Appellant had the films in his possession. *The sufficiency of the evidence is not an issue before this Court,* as Appellant virtually concedes on page 24 of his Brief where he says there is no necessity for the Court to consider the evidence in this case. We note, however, that the Supreme Court of Georgia in Division 6 of its opinion held that "the evidence authorized the verdict" (A. 71).

(F) The Georgia Obscenity Statute Is in Accord with Landmark Decisions of this Court; the Trial was Conducted in Accordance with Standards Set by this Court.

As previously pointed out, the Georgia obscenity statute tracks the definition of obscenity given in the *Roth* case, supra (Appellant's Brief, pages 4 and 5). The trial court charged, word for word, the approved charge in *Roth* (354 U.S. at 490). See charge of the Fulton Superior Court at A. 122. The State proved, by witnesses comprising a cross-section of the community, that the predominant appeal of these films was to a prurient interest, i.e. a shameful and morbid interest in nudity and sex, when considered as a whole and applying contemporary community standards. The State also proved

the additional element of obscenity, clearly defined by this Court for the first time in *Jacobellis v. Ohio*, supra, that the films were "utterly without redeeming social importance". We respectfully submit that counsel for the State of Georgia tried in this case to comply with what he conceived the law of obscenity to be, as interpreted by this Court. No trial errors whatever are asserted by Appellant.

With the greatest respect and deference to this Honorable Court, we point out even the members of this Court are in sharp disagreement on numerous aspects of the obscenity problem. Mr. Justice Harlan, dissenting in *A Book etc. v. Attorney General of Massachusetts* (better known as the "Fanny Hill" case), 383 U.S. 413 (86 S.Ct. 975) said in 1966 that the central development from the aftermath of the *Roth* case is "that no stable approach to the obscenity problem has yet been devised by this Court" (383 U.S. at 455). Mr. Justice Stewart said in *Jacobellis*, supra, that criminal laws are constitutionally limited to hard-core pornography and "I shall not today attempt to further define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . .*" (concurring opinion, 378 U.S. at 197. Italics added).

Mr. Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S. 463 (86 S.Ct. 942) referred to *"the confusing welter of opinions* and thousands of words written in this and two other cases today" (383 U.S. at 476. Italics added).

In the three obscenity cases decided on the same day,

i.e., *Ginzburg, Mishkin* and *A Book*, supra, there were *fourteen* separate opinions by Justices of this Court. In the three cases decided in the *Redrup* opinion, no apparent effort was made to reconcile the opinions of the Justices. Rather, the opinion of the Court seemed to lump all of the divergent views of the Justices into one group and reversed three Courts below by applying all of the varying criteria of the various Justices. In passing, we again insist that the *Redrup* cases are easily distinguishable from this case. They all involved magazines being held for sale to the general public at newsstands. The instant case involves possession of three "stag" films not offered to the general public (so far as the available evidence indicates) but intended for private lustful showings to selected audiences.

Our purpose in detailing the divergent views of the Justices is to point out how difficult it is for a State to keep pace with opinions in this field from this Honorable Court. Legislative criminal law revision is a slow and cumbersome process. The Georgia obscenity statute is in accord with *Roth*. However, it has not been amended to meet the refinements tacked on to *Roth* by more recent decisions of this Court in the obscenity field. Indeed, it would be difficult to draft a new statute and be absolutely certain that it meets the varying criteria of all Justices of this Court. We insist, however, that the Georgia statute does not violate the First and Fourteenth Amendments.

Returning to the instant case, we respectfully suggest that there is no necessity for this Court to again elaborate its divergent views on this most confused constitutional problem. If this Court views these films and finds them to be not only obscene by the *Roth* definition, but vile

and filthy to such an extent as to constitute hard-core pornography, then their possession is not protected by the First Amendment, and this Court need not reach the constitutional question. As Mr. Justice Stewart said, "I know it (hard-core pornography) when I see it." In our opinion, if these films are not obscene, then nothing is obscene! We hope this Court will agree with this appraisal.

We recognize, of course, that two Justices have consistently adhered to their view that the First and Fourteenth Amendments absolutely protect obscene and non-obscene material alike (see comment of Mr. Justice Harlan, dissenting opinion, *A Book*, supra, 383 U.S. at 455). However, the rest of the Court have apparently agreed, with some difference in approach, that obscenity is not protected by the First Amendment. If the Court agrees with our appraisal of the films (as well as that of the jury, the trial court and the Supreme Court of Georgia), we urge this Court to either affirm the judgment below, or dismiss the appeal on the grounds that probable jurisdiction was improvidently noted. Alternatively, if the Court reaches the constitutional issue, we urge the Court to hold that a State may make the possession of obscene matter, with knowledge of its obscene nature, a crime without infringing upon First Amendment rights.

(G) These Films Fall in the Same Category as Those in Landau v. Fording, Chief of Police, 54 Cal. Rptr. 177 (1966).

The appellant Landau was exhibiting a movie film in private showings at colleges, art movie houses and a Y.M.C.A. After being advised by police that the next time it was exhibited it would be confiscated, he insti-

tuted an action for declaratory relief in the Superior Court of Alameda County, California. After viewing the film twice and hearing from expert witnesses, the trial Court found the film to be obscene, applying the *Roth* and *Jacobellis* tests and the California Court of Appeal affirmed. This Honorable Court granted certiorari and *affirmed* the lower Court in a 5 to 4 decision on September 12, 1967. *Landau v. Fording*, 388 U.S. 456 (87 S.Ct. 2109).

Counsel for Appellee have never viewed the film in *Landau*, supra, but from the description of the film, as recited by the California Court of Appeal, it was very similar to these films in the instant case. It "explicitly and vividly revealed acts of masterbation, oral copulation, the infamous crime against nature (sodomy), voyeurism, nudity, sadism, masochism and sex" (54 Cal. Rptr. at 178). Like the film in the instant case, it was an 8 mm. silent film of about thirty minutes duration, with no text, dialogue, or dominant theme. The only material difference between the film in *Landau*, relying upon the description by the California Courts, and the three films involved in the instant appeal is that there were no women and no acts of sexual intercourse between male and female in the *Landau* film. The films in the instant case do show acts of sexual intercourse and sodomy between persons of opposite sexes, but do not show, as we recall the films, acts of sadism. In fact, it appears to counsel for Appellee that the three films processed by Appellant Stanley are probably more vile and filthy than that in *Landau*, supra.

A far stronger case is made out in this case than in *Landau*, supra, of the obscene nature of the respective films. For example, in *Landau* the writer, director and

producer was a "French writer of renown" and the actors were professionals (54 Cal. Rptr. at 180, 182). Seven expert witnesses including college professors, novelists, film critics and television directors testified as to the *non-obscene* nature of the film in *Landau*. Contrast this with the instant case. The "producer", actors and actresses of the *Stanley* films are unknown, and not a living soul took the stand in defense of the films in the instant case, where *all* witnesses agreed that the films were obscene.

We submit that by granting certiorari in *Landau* and affirming the California Courts' finding of obscenity, the majority of this Court must have found that film to be obscene and not entitled to the protection of the First Amendment. We respectfully insist that the same finding should be made in the instant case, and the conviction of Appellant Stanley should be affirmed.

II. THE FEDERAL SEARCH WARRANT WAS VALID WHEN ISSUED AND IS NOT RENDERED INVALID RETROACTIVELY BY MARCHETTI V. UNITED STATES, 390 U.S. 39 (88 S.Ct. 697) AND GROSSO V. UNITED STATES, 390 U.S. 62 (88 S.Ct. 709). THE OBSCENE FILMS WERE LAWFULLY SEIZED AS CONTRABAND DURING A LAWFUL SEARCH FOR BOOKMAKING PARAPHERNALIA.

Counsel for Appellee have some uncertainty as to whether this question of alleged unlawful search and seizure is actually before this Court, inasmuch as it is not an appealable question. Appellee conceded this in his Jurisdictional Statement, at page 14, as follows:

> "The search and seizure question, *while not an appealable question,* is substantial and should be treated as a certiorariable question under 28 U.S.C. No. 2103 (Italics added)."

This Court noted probable jurisdiction on October 14, 1968, without elaboration and without restricting review to the only appealable question, the constitutionality of the Georgia obscenity statute. Exactly the same thing occurred in another obscenity case, *Mishkin v. New York*, supra. The Court's opinion held that its "unrestricted notation of probable jurisdiction justified appellant's briefing of the search and seizure issue." (383 U.S. at 512) However, the Court then declined to reach the merits of the search and seizure claim and dismissed the writ as improvidently granted (383 U.S. at 513-514).

On the basis of *Mishkin*, we think that Appellant was justified in briefing this non-appealable issue, and that we must respond to that portion of his brief. It may be that the Court will decide to follow the same course in the instant case as it did in the *Mishkin* case, however.

As previously pointed out, Appellant's Questions 2, 3 and 4 all deal with the search and seizure issue and are overlapping to some extent. We have reframed Question 2 to more clearly establish the exact question before this Court. In this Section we will deal with all of Appellant's issues embodied in Questions 2, 3, and 4.

(A) There is No Issue as to the Validity of the Search Warrant When Issued, and the Sufficiency of the Probable Cause Contained in the Officer's Affidavits.

It is important to note that Appellant has never objected to the search warrant *as issued* on the usual grounds that the property to be searched for and seized is inadequately described or not subject to seizure, the premises are inadequately described, or that there was

insufficient probable cause in the affidavits of the State and Federal officers to authorize the United States Commissioner to issue the search warrant.

The Trial Court made a specific finding that "the lawfulness and sufficiency of said search warrant and affidavits upon which the search warrant was issued were not attacked or questioned by the defense" (A. 58-59). The record completely supports this finding of fact.

Further, nowhere in his Brief on the Merits does Appellant even now raise any question as to the validity of the search warrant or affidavits *as of the date it was issued,* on September 7, 1966. Thus we start off with a valid Federal search warrant to search Appellant's home for bookmaking records, wagering paraphernalia, and money, issued some 16 months prior to the *Marchetti* and *Grosso* decisions relied upon by Appellant.

(B) Appellant Concedes that Normally an Officer Executing a Valid Search Warrant May Seize Contraband or Evidence of Another Crime, Even though the Article is Not Particularly Described in the Warrant.

Counsel for Appellant, with commendable candor, makes the foregoing concession on Page 21 of his Brief on the Merits. Of course, this principle is firmly established in search and seizure case law. In view of this concession, we will not encumber this Brief by citations in support thereof. However, he argues that this general rule does not apply where the undescribed contraband is obscene matter (Brief, pages 19-23). In other words, if the officers had found narcotics, non-tax-paid whiskey or stolen property in Appellant's house while executing the search warrant for bookmaking records, Appellant concedes that they could have lawfully seized such ar-

titles. But he argues that a different standard applies to these films showing sodomy, nudity and sexual intercourse, relying upon *Marcus v. Search Warrants*, 367 U.S. 717 (81 S.Ct. 1708). This reliance is misplaced.

(C) The Instant Case is Completely Distinguishable from *Marcus v. Search Warrants, supra.*

The Supreme Court of Georgia considered and distinguished the *Marcus* case, supra, in the first division of its opinion (A. 66-68). We will elaborate on the vast differences between that case and the instant one. In *Marcus*, Missouri search warrants were issued to seize "obscene publications" (367 U.S. at 732) at five newsstands and one wholesale magazine distributor's establishment. The officers executed the search warrants by seizing all copies of all magazines *which in their judgment* were obscene. Approximately 11,000 copies of 280 publications (consisting of "girlie" magazines, nudist magazines, sex manuals, cartoon and joke books and photography magazines) were hauled away in trucks. Later, the Trial Court found only one hundred of the two hundred eighty seized items to be obscene. This Court found this search and seizure to be unlawful on the following grounds: (1) the warrants specified no publications, but gave the broadest discretion to the officers to select such magazines as they considered obscene; (2) the officers were provided no guide to the exercise of informed discretion; (3) the warrants were issued on the conclusory assertions of a single police officer; (4) decisions were made *ad hoc* on the spot by officers as to obscenity with little opportunity for reflection and deliberation; (5) one hundred eighty publica-

tions not found obscene were suppressed from the market for over two months.

It is really belaboring the obvious to point out the many distinguishing features between *Marcus*, supra, and the instant case. In *Marcus*, a "general" search warrant not particularly describing any obscene publications was executed by a mass seizure by the truckload of both obscene and non-obscene matter from newsstands selling to the public. The officers seized such magazines as they deemed obscene and did not seize others. Seizure or non-seizure depended on the hurried, individual appraisal by each officer of the magazines he examined. Thus, due process safeguards were lacking in *Marcus*, to "assure non-obscene material the constitutional protection to which it is entitled" (367 U.S. at 731). Finally, *Marcus* involved *literature* offered for sale and booksellers, thus squarely involving freedom of speech and of the press, constitutionally guaranteed by the First Amendment.

The instant case is entirely different. Appellant was suspected of being a *bookmaker*, instead of being a *bookseller*. The hidden cans of film were not being offered for sale; they were not part of a stock of merchandise on display in a business establishment, but were concealed in a bedroom. There was no mass seizure at all — only three small rolls of film were seized. Nothing later found to be non-obscene was seized. And the films are so obviously hard-core pornography that any officer or citizen of average intelligence would know it when he saw it. In this case there is no interference with freedom of the press. The general public was not deprived of its rights to purchase these films. At most, the

only persons deprived of the questionable privilege of viewing these films were Appellant's disappointed guests.

Appellant says that the seizure of the films was unlawful without a prior adjudication of obscenity (Brief, Page 22). He says the officer should have gone to a magistrate "to make oath to him what he had seen" and secured an adjudication that the films were obscene. Presumably he means that an officer should have withdrawn from the house and made out an affidavit describing the films he had viewed and obtained a *new* search warrant authorizing seizure of the films. However, Appellant cites no case in support of this line of argument. We will cite one directly in point. In *Johnson v. United States,* D.C. Cir. 1961, 293 F.2d 539, cert. den. 375 U.S. 88, this exact contention was advanced that an officer, who while engaged in searching Appellant's bedroom under a search warrant describing stolen property, found in a dresser drawer a credit card and a statement *not described* in the warrant, should have secured a new search warrant before seizing the credit card and statement. The United States Court of Appeals for the District of Columbia rejected this contention and said, in pertinent part:

> *"An officer engaged in a lawful search is not confined to seizing only those items described in the warrant, especially where the unlisted items seized are instrumentalities of a crime.* The Fourth Amendment provides that the warrant must particularly describe the things to be seized. But it is well established *that given a lawful search some things may be seized in connection therewith which are not described in the warrant.'* Palmer v. United States, 1953, 92 U.S. App. D.C. 103, 104, 203 F.2d

66, 67. See also Bryant v. United States, 5 Cir., 1958, 252 F.2d 746." (Italics added).

The law does not require an officer to do a useless thing. What weight could a new search warrant issued by a magistrate upon a mere description of the films by the officer who had actually viewed them add to the lawfulness of the seizure? It would amount to a judicial determination by the magistrate that the films were obscene, *when he had never viewed them.* Had this been done, Appellant would undoubtedly attack such a procedure as vigorously as he is now attacking the seizure by the officer as it was actually done in this case.

Once again we respectfully insist that the clear-cut pornography of the films is controlling here. No prior adjudication of obscenity was necessary. The films were the kind of obscenity that one recognizes when he sees it. It was contraband under Georgia law, and the State officer would have been derelict in his duty if he had not seized it and arrested the Appellant.

Finally, we point out that the action of the officers in putting the films in a projector and viewing them was entirely reasonable as a logical step in their search for bookmaking records. In this age of sophisticated methods of record keeping, it is entirely possible that a big-time bookmaker might reduce his permanent records, such as names and betting code numbers of his regular customers, and names, addresses and phone numbers of out of state bookie syndicates with him he "lays off" bets, to motion picture films, put them in a can with the misleading title "Young Blood" pasted thereon, and hide it in his desk drawer, hoping it would pass uninspected in the event of a search of his home, in a sort

of "purloined letter" scheme. Cf. *Abel v. United States,* 362 U.S. 217, (80 S.Ct. 683) where a Russian spy had reduced classified security information of this country to 18 microfilms and concealed them in a hollow pencil. Thus, counsel for Appellee respectfully insist that the seizure of the film was entirely lawful *at the time it was done,* and violated none of Appellant's Fourth Amendment rights.

(D) The Decisions in the Marchetti and Grosso Cases Should Not Render Invalid Retroactively a Valid Search Warrant Issued Sixteen Months Prior to Those Decisions.

On the date the Federal search warrant in this case for bookmaking records, etc., was issued, such search warrants were commonplace. This Court had previously held in *United States v. Kahriger,* 345 U.S. 22 (73 S.Ct. 510) and *Lewis v. United States,* 348 U.S. 419 (75 S.Ct. 415) that the Wagering Tax Act was constitutional. A multitude of Federal search warrants similar to the one in the instant case had been upheld, and convictions obtained as a result of evidence seized thereunder had been affirmed by United States Appellate Courts. This is a fact so generally recognized that citations would be superfluous.

This trial was begun on January 17, 1967, and the jury returned a guilty verdict on January 19, 1967 (A. 60). Just slightly over one year later, on January 29, 1968, this Court rendered its decisions in *Marchetti v. United States,* 390 U.S. 39 (88 S.Ct. 697) and *Grosso v. United States,* 390 U.S. 62 (88 S.Ct. 709), holding in effect that a defendant in a criminal case charged with failing to register, pay the occupational tax (*Marchetti*)

and the excise tax (*Grosso*) could assert at trial his constitutional right against self-incrimination under the Fifth Amendment. That is *all* this Court held. The Court said in part, in *Marchetti:*

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissive; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements." (390 U.S. at 61).

Nowhere do *Marchetti* or *Grosso* hold that valid Federal search warrants issued sixteen months prior to those decisions are *retroactively* rendered unlawful. In fact, these cases do not even hold that Federal search warrants could not issue validly *in the future,* to seize bookmaking paraphernalia. It appears to counsel for Appellee that this Court left standing intact the Federal crime but pulled the teeth of its enforcement power by criminal prosecutions, by extending the Fifth Amendment privilege to those gamblers prosecuted in Federal Courts.

Following its decisions in *Marchetti* and *Grosso,* this Court on March 4, 1968, summarily vacated the judgments in some twenty-one criminal cases pending on certiorari from U.S. Circuit Courts of Appeal and from two State Appellate Courts (U.S. Law Week, Vol. 36, No. 34, pages 3338, 3339). Convictions had been affirmed in all these Federal wagering cases under the now overruled *Kahriger, Lewis* doctrine. The two State Court cases where judgments of conviction were vacated both involved gambling. *Rainwater v. Florida,* 186 So. 2d 278, involved a State conviction for lottery obtained by use of evidence seized under a Federal

Court search warrant for wagering paraphernalia. *Lee v. Kansas City,* 414 S.W. 2d 251, involved a State Court conviction for possession of a Federal wagering stamp with intent to use it.

Since the entire rationale of *Marchetti* and *Grosso* was that requiring a gambler to register *federally* and pay *federal* taxes on his wagers compelled him to incriminate himself for violating *State anti-gambling laws,* it is only logical that the *Rainwater* and *Lee* convictions were vacated, since they were the end result of such enforced self-incrimination.

The instant case stands upon an entirely different footing, however. Appellant Stanley *was not convicted* for violating the *State gambling laws.* He was convicted of an entirely different offense — possession of obscene matter. He has not been prosecuted in Federal Court for violation of the wagering laws. He has no legal standing to complain *in an obscenity case* that he would have been forced to incriminate himself if he had registered and paid Federal taxes as a gambler, because he is not charged here with State gambling offenses.

There is also a definite indication that this Court has not yet fully decided how far it will expand its limited ruling in *Marchetti* and *Grosso,* supra. We base this statement upon the case of *United States v. United States Coins and Currency* in the amount of $8,674.00, 7 Cir. 1967, first reported at 379 F.2d 946. This was a libel to forfeit money seized in a search of the person of one Donald Angelina after his lawful arrest at a race track. Recap sheets were also seized from his person at the time of the arrest and incidental search. He had not registered as a gambler and had not paid the Federal

occupational tax. The Seventh Circuit Court of Appeals initially affirmed the District Court's forfeiture of the money.

After this Court issued its opinions in *Marchetti* and *Grosso*, it granted certiorari in this libel action and vacated the judgment of the Seventh Circuit, citing *Marchetti* and *Grosso* (see 390 U.S. 204). The Seventh Circuit Court of Appeals then reconsidered *United States v. U.S. Coins and Currency*, etc., supra, and by construction of *Marchetti* and *Grosso reversed* the District Court's forfeiture of the money, (393 F.2d 499), on April 8, 1968. The United States sought certiorari from this latest adverse decision of the Seventh Circuit and this Honorable Court *granted* certiorari on November 18 ,1968 (37 U.S. Law Week 3181).

Thus this question as to whether money (the fruits of the crime of violating the Federal Wagering Act) can be forfeited, despite *Marchetti* and *Grosso*, has gone full circle and is back before this Court for decision. We think that case illustrates the narrow scope of the ruling of this Court in *Marchetti* and *Grosso*, and shows that the exact implications and extent of those two decisions are still in flux by this Court. We can certainly see nothing in those decisions which could possible reach back sixteen months and render invalid a Federal search warrant which was completely valid under prior decisions of this Court at the time of its issuance.

In one final word, we respectfully point out that this Court does not as a rule apply retroactively far-reaching decisions which establish new concepts or which overrule this Court's other earlier decisions. It is almost unnecesary to cite (search and seizure) *Mapp v. Ohio*,

367 U.S. 643 (81 S.Ct. 1648), held not retroactive in *Linkletter v. Walker*, 381 U.S. 618 (85 S.Ct. 1731); (comment on failure of accused to testify) *Griffin v. California*, 380 U.S. 609 (85 S.Ct. 1229), held not retroactive in *Tehan v. Shott*, 382 U.S. 406 (86 S.Ct. 459); (confessions) *Miranda v. Arizona*, 384 U.S. 436 (86 S.Ct. 1602) held not retroactive in *Johnson v. New Jersey*, 384 U.S. 719 (86 S.Ct. 1772); and (line-up identification) *United States v. Wade*, 388 U.S. 218 (87 S.Ct. 1926) and *Gilbert v. California*, 388 U.S. 263 (87 S.Ct. 1951) held not retroactive in *Stovall v. Denno*, 388 U.S. 293 (87 S.Ct. 1967).

For all the reasons urged, the *Marchetti* and *Grosso* decisions should have no retroactive effect upon a valid Federal search warrant issued, executed and introduced in evidence in a motion to suppress evidence preceding a criminal trial occurring long before those decisions were rendered by this Honorable Court.

CONCLUSION

The Georgia obscenity statute is constitutional. The films in question are so clearly hard core pornography that their possession is not protected by the First Amendment. They were lawfully seized as contraband under authority of a valid Federal search warrant. Therefore, this Honorable Court should either affirm the judgment of the Supreme Court of Georgia, or dismiss this appeal on the ground that probable jurisdiction was improvidently noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief for Appellee on the Merits with first class postage prepaid, addressed to Wesley R. Asinof, Esquire, 3424 First National Bank Building, Atlanta, Georgia 30303, counsel of record for Appellant.

This 19th day of December, 1968.

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